Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities	)))))	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)))	CC Docket Nos. 95-20, 98-10
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements	))))))	

REPLY COMMENTS OF XO COMMUNICATIONS, INC. ON NOTICE OF PROPOSED RULEMAKING

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XO Communications, Inc. ("XO") respectfully submits these reply comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned docket.[1]

I. INTRODUCTION AND SUMMARY

XO agrees with the majority of the record that there is absolutely no basis for the Commission's tentative proposal in this NPRM regarding the classification of the transmission component of wireline broadband Internet access services. The record demonstrates overwhelmingly instead that the Commission must conclude that the transmission component of wireline broadband Internet access, whether offered bundled, or on a stand-alone basis, is subject to Title II common carriage regulation. Any other conclusion departs significantly from

[1] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* FCC 02-42, CC Docket NNO. 02-33, CC Docket Nos. 95-20, 98-10, Notice of Proposed Rulemaking (2002) ("NPRM").

precedent and the pro-competitive goals of the Telecommunications Act of 1996 ("1996 Act").[2] The NPRM's tentative conclusion is also clearly contrary to the Commission's primary policy goal in this proceeding to "encourage the ubiquitous availability of broadband to all Americans."[3] Nearly all parties note that the NPRM's proposals would in fact result in the exact opposite of the Commission's stated goals by eliminating competition and incentives for broadband innovation and investment.[4]

There is tremendous evidence on the record that the Commission is compelled by law and precedent to classify the transmission component of wireline broadband Internet access services as "telecommunications services" subject to Title II regulation. XO submits its reply comments here to concur that the adoption of the NPRM's tentative conclusions would be unsupported by law and also to emphasize that the Commission's mandate to promote the public interest also forecloses it from the NPRM's proposed decision. As a competitive full service provider of both local and long distance communications and information services, XO and virtually all other carriers would be greatly injured by adoption of the tentative conclusions. Apprehension regarding the harmful effects of implementing the NPRM's tentative conclusions is not limited however to only competitive carriers. Indeed, nearly all the parties in this proceeding, including other federal agencies, consumer advocates, state commissions, information service providers ("ISPs"), and competitive carriers, express grave concerns over the significant adverse impact

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[2] *See* NPRM at paras. 21-27.

[3] NPRM at para. 3.

[4] *Se, e.g., generally* California Internet Service Providers Association ("CISPA") comments; California Public Utilities Commission ("California PUC" or "CPUC") comments; Covad Communications comments; DirectTV comments; New York State Department of Public Service ("NYDPS") comments; Socket Holdings Corporation comments; Time Warner Telecom ("Time Warner") comments; Alaska Commission reply comments.

the proposed classifications in this NPRM could have on broadband deployment and competition.

Not surprisingly, only the Bell Operating Companies ("BOCs") and incumbent local exchange carriers ("ILECs") support the NPRM's tentative conclusions because as noted, the outcome of the NPRM proposals would be the complete erosion of any remaining local competition.[5] Indeed, some BOCs do not even attempt to assert that the NPRM would promote competitive broadband choices or alternatives. Instead, they misuse this proceeding and the Commission's stated pro-competitive goal in the NPRM to opportunistically advocate the elimination of all unbundling and resale obligations under the 1996 Act. BellSouth for example baldly asserts that, if the NPRM conclusions were adopted, competitive local exchange carriers ("CLECs") would no longer have any right to unbundled network elements ("UNEs") to the extent that the CLEC seeks to use the UNE for the provision of broadband services to their customers.[6] While BellSouth's candor regarding its intentions is refreshing, it is also highly alarming. It is not simply seeking an even playing field in the retail marketplace for its digital subscriber line ("DSL") service to compete with cable offerings -- the oft-cited red herring of the broadband debate. Rather, its ultimate goal is to use this regulatory proceeding to eliminate its statutory unbundling and resale obligations in providing wholesale services to its competitors. This goal is more far-reaching and devastating to competition and to consumers than any of the outcomes suggested in the NPRM and must be firmly rejected by the Commission.

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[5] *See, e.g.*, BellSouth comments, SBC comments, and Verizon comments.

[6] BellSouth comments at 17-18. BellSouth is not the only ILEC taking such an extreme position. Both Verizon and SBC further contend that unbundling obligations would not apply to networks used to provide wireline broadband Internet services. SBC comments at 32; Verizon comments at 32-33.

The Commission also should not ignore the effect of the NPRM on a variety of other regulatory mandates. Critically, a potential effect of classifying the entire wireline broadband Internet access service as an "information service" subject to Title I regulation is destabilization of the universal service system. Further, as discussed by several commenters, including the U.S. Department of Justice and the Secretary of Defense, removing broadband services from the purview of Title II could have significant and detrimental effects on national security, consumer protection, consumer privacy and separations accounting.

Accordingly, there is no legal or policy basis for the Commission to proceed with the course laid out in the NPRM. The Commission should reaffirm existing precedent that the underlying transmission of wireline broadband Internet access services is a "telecommunications service" subject to Title II regulation. To the extent that the Commission seeks to achieve a particular result in this proceeding – such as regulatory parity for different broadband platforms – XO urges the Commission to recognize that that are less drastic means of accomplishing this, including forbearance from Title II once it has determined that the requisite factors of forbearance have been met.

II. THE RECORD OVERWHELMINGLY SUPPORTS A CONCLUSION THAT THE UNDERLYING TRANSMISSION OF WIRELINE BROADBAND INTERNET ACCESS SERVICES ARE "TELECOMMUNICATIONS SERVICES" AND SUBJECT TO TITLE II REGULATION

XO joins the near unanimous opposition in this proceeding to the NPRM's tentative conclusion that the bundled offering by a provider of wireline broadband Internet access service over a provider's own facilities constitutes a single offering of an "information service" without a "telecommunications service" component.[7] Many parties point out that the Commission itself

[7] *See* NPRM at paras. 21-24. *See, e.g.,* Alaska reply comments at 13; California PUC comments at 9; Covad comments at 2; AOL Time Warner comments at 15-17; Time Warner comments at 9; TDS Telecommunications et

has consistently over the years concluded that the transmission or transport necessary to access an ISP consists of a two-way transmission path, and that the transmission is a telecommunications service.[8] Moreover, the record reflects that federal precedent supports finding that the transmission of DSL services is a "telecommunications service."[9] The Commission has failed to provide any adequate or reasoned basis for suddenly changing its policies and course on this issue. Accordingly, XO strongly opposes the NPRM's tentative conclusion that an entity is not providing a "*telecommunications service*" subject to Title II common carrier regulation and instead is merely providing or using "telecommunications" in the case where the entity uses its own facilities to provide wireline broadband Internet access services.[10]

A. The Record Compels a Conclusion That the Transmission Component of Wireline Broadband Internet Access Service (Whether Offered Bundled or on a Stand-Alone Basis) is a "Telecommunications Service"

The record undeniably demonstrates that the transmission component of wireline broadband Internet access services or DSL services clearly falls within the definition of a "telecommunications service" under Section 153(46) of the Act.[11] First, aside from the ILECs, there is no dispute with the Commission conclusion that the transmission component underlying wireline Internet access services, offered on a *stand-alone* basis, is a "telecommunications

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al. comments at 11.

[8] *See* California PUC comments at 13-17; CISPA comments at 9, 15-18; Time Warner comments at 9-14.

[9] *Id.; see, e.g., GTE Telephone Operating Cos., GTOC Tariff No.1, GTOC Transmittal No.1148,* FCC 98-292, CC Docket No.98-79, Memorandum Opinion and Order (1998); *Federal-State Joint Board on Universal Service*, FCC 98-67, CC Docket No.96-45 (1998) ("Report to Congress") ("provision of leased lines to Internet service providers, however, constitutes the provision of interstate telecommunications") at paras. 63, 66-77; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, CC Docket No.98-147, Order on Remand (1999) ("Advanced Services Remand Order") at para. 8.

[10] *See* NPRM at paras. 25-26.

[11] *See, e.g,* AOL/Time Warner comments at 14-15; California PUC comments at 10; Time Warner comments at 11-

service."[12] Although Verizon attempts to argue that transmission of a wireline broadband Internet access service, even offered on a stand-alone basis, is not a "telecommunications service,"[13] its assertion ignores the plain text of the statute. WorldCom correctly observes that the statute defines "telecommunications services" as the offering of "telecommunications"[14] directly or indirectly to the public or a fee; and thus, the transmission component such as DSL, when offered on a stand-alone basis to other carriers or providers or to the public for a fee, is a "telecommunications service."[15]

Moreover, as discussed below, XO agrees with the California PUC in supporting the Commission's tentative conclusion that, when telecommunications are offered on a "wholesale basis to a CLEC or to an ISP, the services are 'effectively available' directly to the public" and thus meet the statutory definition of a "*telecommunications service*" and not merely of "telecommunications."[16] There is no reason for the Commission to depart from its past conclusions on this point.[17]

13; WorldCom comments at 58-59.

[12] *See* NPRM at para. 26. *See also* AOL/Time Warner comments at 1-4, 15-21; ASCENT comments at 4; CISPA comments at 9-11; Nebraska Independent Companies comments at 4; California PUC comments at 9; Ohio PUC comments at 3; Secretary of Defense comments at 3; Socket Holdings Corporation comments at 3-6; WorldCom comments at 6; Time Warner comments at 9.

[13] Verizon comments at 9-10.

[14] The Commission has not questioned that the transmission component of wireline Internet access is at a minimum, "telecommunications." *See* NPRM at para. 25.

[15] *See* WorldCom comments at 58. "Telecommunications" is defined as the "transmission between or among points specified by the user, of information of the user's choosing, without regard to the change in the form or content of the information as sent." *See* 48 U.S.C. 153(43). *See also NPRM* at para. 26, and n.60, *citing Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No.98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking (1998) at para. 35 (finding that DSL and advanced services are "telecommunications services" when offered on a stand-alone basis or offered to the public).

[16] California PUC comments at 23 (emphasis added); *see also* CISPA comments at 14. The CPUC also correctly notes that there is no distinction between telecommunications that are offered on a wholesale or retail basis, for purposes of determining whether such telecommunications are "telecommunications services," because the offering to a class of users is making the service effectively available to the public. *Id.*

[17] *See* Time Warner comments at 14, and n.18, *citing Deployment of Wireline Services Offering Advanced*

It is when the Commission considers the classification of wireline Internet access services bundled with the transmission component, however, that the Commission's reasoning departs from existing law.[18] The majority of commenters disagree with the Commission's tentative proposal to classify the transmission component, when provided over a carrier's own facilities and bundled with wireline Internet access service, as merely "telecommunications," and not as a "telecommunications service."[19] For example, the California PUC and other parties note that the Commission ignores a long line of Commission precedent that, while wireline broadband Internet access services may constitute an information service, the *transmission underlying these services* –whether offered on a stand-alone basis, or bundled with the provider's own wireline Internet access services – is a "telecommunications service" subject to Title II regulation.[20]

XO also agrees with those many commenters noting that the ILECs' provision of a transmission component bundled with wireline broadband Internet access also meets the test of common carriage lending further support for subjecting the transmission component to Title II regulation.[21] WorldCom notes that the traditional test for common carriage (which was incorporated into the 1996 Act's statutory definition of "telecommunications service") addresses whether the service is offered to the public on an indifferent and indiscriminate basis, specifically: (1) whether there is any legal compulsion thus to serve indifferently, and if not, (2) whether there are reasons implicit in the nature of the service to expect an indifferent holding out

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Telecommunications Capability, FCC 99-355, Second Report and Order (1999) at para. 21.

[18] *See* NPRM at 25.

[19] *See* California PUC comments at 9-10; NYDPSC comments at 3; Socket Holdings Corporation comments at 6; WorldCom comments at 59.

[20] CPUC comments at 9; Ohio PUC comments at 3; Secretary of Defense comments at 3; Socket Holdings Corporation comments at 6; WorldCom comments at 6; Time Warner comments at 9.

[21] *See, e.g.*, California PUC comments at 30-31; CISPA comments at 16; WorldCom comments at 61-63; NYDPS comments at 4; Socket Holdings Corporation comments at 3.

to the eligible user public.[22] As WorldCom notes, this traditional test of common carriage, when applied to the ILEC's transmission component of wireline broadband Internet access service, would clearly result in classification of the transmission services as "telecommunications services" subject to Title II regulation.[23] Accordingly, given the ILEC's ownership of bottleneck facilities and monopoly control, the public interest dictates that the ILECs have a "legal compulsion to serve all customers indifferently." XO agrees with WorldCom and other parties that it is wholly inconsistent with the statute and common carriage law to conclude that ILECs may simply provide the transmission component as private carriage "telecommunications" to its own ISP, without being required to provide this service on a common carriage basis indifferently to the public.[24]

Additionally, CISPA notes that under the Commission's longstanding *Computer II* rules, "carriers that *own* common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[25] XO similarly agrees with Time Warner that the Commission should determine that wireline carriers like ILECs "are subject to *Computer II*, under which they must separately offer the telecommunications component of an information service as a "telecommunications service."[26]

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[22] WorldCom comments at 62.

[23] WorldCom comments at 62-63.

[24] WorldCom comments at 63; California PUC comments at 25; CISPA comments at 16-18.

[25] *See* CISPA comments at 14 (emphasis added).

[26] Time Warner comments at 2.

B. Regardless of Whether the Commission Classifies the Transmission Component of Wireline Broadband Internet Access Services as "Telecommunications" or as "Telecommunications Services," the Transmission Component Should be Subject to Title II Regulation

Regardless of whether the Commission determines that the transmission component of wireline broadband Internet access services is "telecommunications" or "telecommunications services," XO strongly agrees with the California PUC that the transmission component should be subject to *Title II regulation* as a common carrier transmission service by a facilities-based provider.[27] This conclusion should apply, moreover, independent of whether the service is bundled with the carrier's own information service or offered on a stand-alone basis to ISPs or other end users. Finally, XO urges the Commission to recognize that transmission services provided by a *dominant ILEC* should *always* be subject to Title II common carrier regulation, unless certain competitive conditions are met.

The same analyses and reasons discussed above for why the transmission component should be considered as "telecommunications services" apply to why the Commission should continue to treat the transmission component of wireline broadband Internet access services under a Title II regulatory framework. In addition, Congressional intent and policy reasons dictate this conclusion. XO agrees with California PUC and WorldCom that there is absolutely no indication that Congress intended for an ILEC to be exempt from the provisions of Title II when it bundles its DSL services with its own ISP services.[28] Indeed, given that Congress imposed bottleneck facilities-unbundling obligations on ILECs in the 1996 Act, the California

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[27] The California PUC further articulates that, "[b]y suggesting that the offering of stand-alone transport service, in contrast to bundled transport service, deserves disparate regulatory treatment as a common carrier service, the FCC essentially leaves it to the ILEC to decide unilaterally whether or not to offer this service to its competitors." California PUC comments at 25.

[28] California PUC comments at 24; WorldCom comments at 62-64.

PUC observes that "it cannot be a matter of discretion for the ILEC to offer, or not to offer, this common carrier service to third parties when the ILEC itself bundles this service with its own information services."[29] Moreover, the Commission has time and again determined that loops providing high capacity services are UNEs that must be provided to requesting telecommunications carriers.[30] Deregulating the transmission component of wireline broadband Internet access services could result in ILEC abuses, such as those expressly articulated by BellSouth and other ILECs (refusal to provide loops to CLECs where the CLEC would use the loop for Internet access services).[31]

Moreover, XO echoes the comments of WorldCom that the NPRM's proposal to classify these transmission services as outside of Title II regulation, effectively would "jettison thirty years of common carriage regulation of bottleneck facilities, and a 500-year common-law doctrine that holds that such facilities need to be made available to all that need them to provide their own goods and services."[32] As discussed numerous times by various parties in this proceeding and in the *Non-Dominance* proceeding, the ILECs continue to retain monopoly power over the local markets. Allowing the ILECs to provide bottleneck facilities only to certain select parties as this NPRM proposes, effectively legally sanctions the ILEC's monopoly power, allows them to evade the requirements of the 1996 Act, and irreversibly harms competitors seeking access to the local network. For these reasons, WorldCom persuasively illustrates that

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[29] California PUC comments at 26.

[30] *See Implementation of Local Competition Provisions of the Telecommunications Act of 1996,* FCC 96-325, CC Docket No. 96-98, First Report and Order (1996) ("Local Competition First Report and Order"), at para. 380; *Implementation of Local Competition Provisions of the Telecommunications Act of 1996,* FCC 99-238, CC Docket No.96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (1999) ("UNE Remand Order") at para. 166.

[31] *See, e.g*. BellSouth comments at 17-18; SBC comments at 32; Verizon comments at 32-33.

[32] WorldCom comments at 8.

the Congressional intent behind the 1996 Act was to ensure that dominant facilities-based carriers such as ILECs are subject to Title II regulation in their provision of bottleneck transmission services.[33] Whether the ILEC bundles these services with ILEC-affiliated ISP services or sells them on a stand-alone basis to end-users or other CLECs should not change this basic regulatory framework.

Finally, as CISPA notes, the Commission has no experience in establishing safeguards under Title I, and "the scope of the Commission's authority under Title I is unformed and untested."[34] Accordingly, the Commission should not attempt to deregulate the transmission services under Title II and should retain *Computer III* safeguards against discrimination to ensure that broadband deployment and availability continues to be provided to all Americans.

III. THE EFFECT OF REMOVING BROADBAND TRANSMISSION SERVICES FROM TITLE II REGULATION WOULD BE DISASTROUS FOR COMPETITION AND ULTIMATELY, FOR BROADBAND DEPLOYMENT

In addition to the clear legal reasons for classifying and regulating the transmission component of wireline Internet access services under a Title II framework, nearly all commenters highlight the extremely harmful impact that the NPRM's conclusion would have on local competition and the Commission's goals in this proceeding.[35] Although the Commission appears to believe that the minimal regulation proposed by the NPRM will stimulate broadband investment, the record is replete with evidence that the NPRM's proposals would strike a devastating blow to an already fragile competitive market, "extending the Bell's monopoly

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[33] WorldCom comments at 23.

[34] CISPA comments at 5.

[35] *See* California PUC comments at 1-2; CISPA comments at 67-69; WorldCom comments at 5; TDS Telecommunications et al comments at 14; Covad comments at 15-19.

power," and ultimately leading to fewer broadband alternatives and higher broadband service prices.[36]

XO agrees with CISPA that removal of safeguards against ILEC discrimination "would remove the foundation for the growth and success of the Internet."[37] As the Ohio Commission notes, the "FCC fails to provide any empirical support" for its "mistaken belief that reclassification of DSL and related transmission facilities to Title I jurisdiction will result in the ubiquitous deployment of DSL at reasonable prices."[38]

A. The Current Environment

Many commenters note that there is little competition in the broadband transmission services market. ILECs continue to dominate the market in providing wholesale broadband customer access to facilities-based ISPs; and while there is some inter-modal competition, very limited competition exists in the intra-modal DSL market.[39]

Even where there is inter-modal competition, this competition is limited to the residential consumer market.[40] Moreover, deregulating the transmission component of broadband services at this time would further erode what limited intra-modal competition exists and would ultimately achieve the opposite effect of higher prices and less broadband availability.[41] Intra-modal competition is critical to ensuring ILEC investment in broadband deployment. Numerous

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[36] WorldCom comments at 2-3, *citing* Editorial, "Things We Don't Like," Bus. Wk (Mar. 18, 2002).

[37] CISPA comments at 13.

[38] Ohio PUC comments at 28.

[39] *See, e.g.,* DIRECTV comments at , WorldCom comments at 33, Alaska Comm'n Reply comments at 6; Time Warner comments at 33; CISPA comments at 28.

[40] Time Warner comments at 32; WorldCom comments at 36.

[41] News articles further document the ILEC domination of the DSL market and the difficulties this has posed for their customers, such as ISPs. *See e.g.* Hatlestad, Luc, "The DSL Debacle," Red Herring (Jul. 24, 2001) at http://www.redherring.com/mag/issue100/170019817.html

parties characterize as simply wrong the Commission's assumption that ILECs would have greater incentive to invest in broadband deployment if ILECs did not have to unbundle the telecommunications component of their Internet access services.[42] The Ohio PUC correctly states that both intra- and inter-modal competition is crucial for the deployment of broadband choices and that competition will not grow "unless the FCC continues to allow competing LECs access to the ILECs' local distribution facilities."[43]

Finally, the Commission's own advanced services report and industry analysis surrounding the controversy indicate that there has been a substantial amount of growth in broadband deployment in spite of, or perhaps, *because of,* existing obligations on the ILECs to provide and/or unbundle the transmission component as "telecommunications services" to requesting telecommunications carriers.[44] Indeed, some industry articles note that current regulatory frameworks are not the impediment to broadband deployment, and rather, the impetus for broadband deployment – at least by ILECs – has been the competitive pressures of the CLECs and cable providers.[45]

B. Section 251(c) Obligations

Practically all commenters, even the ILECs, note that the Commission's proposal in the NPRM would have far-reaching impacts on the ability of competitors to obtain access to the

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[42] *See, e.g.*, Alaska reply comments at 4; Ohio PUC comments at 27; Time Warner comments at 7-8; Covad comments at 11-13.

[43] Ohio PUC comments at 27.

[44] Alaska reply comments at 4, citing FCC "Broadband Report," *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 02-33, CC Docket No. 98-146, Third Report (2002); *see also* Press Release, "FCC Releases Study on Telephone Trends" (May 22, 2002)(noting that high speed lines increased by 36% during the last half of 2001).

[45] *See, e.g.,* Gove, Alex, *"*Toeing the Line*," Red Herring (*May 1999) at *http://www.redherring.com/mag/issue66/news-dsl.html* (noting that CLECs have forced ILECs to deploy DSL in

ILEC's bottleneck facilities or to negotiate fair contracts with the ILECs. Such an outcome cannot and should not be allowed.

As the California PUC observes, the Commission's proposal could potentially be read to propose the elimination of the critical obligations imposed on ILECs under Section 251(c)(3) of the 1996 Act.[46] Section 251(c)(3) requires ILECs to provide nondiscriminatory unbundled access to ILEC's network for the provision of a "telecommunications service" and failure to classify the transmission component of wireline Internet access as a "telecommunications service" could result in ILECs' denial of UNEs to requesting CLECs.

The ILECs, in fact, insist that the anti-competitive result feared by the parties is precisely the Commission's intent. BellSouth and other ILECs claim that if broadband services were an "information service," the 1996 Act would prevent CLECs from using network facilities purely for the provision of broadband Internet access services.[47] It is unclear what the ILECs' position would be if the CLEC intended to use a facility for both telecommunications and wireline Internet access services, but the Commission clearly must not classify wireline Internet access transmission in such a way as to create potential for abuse under *any* scenario.[48] Moreover, as Time Warner points out, an ILEC might also argue that its competitors are not entitled to loops that the ILEC has built or is using in order to provide broadband Internet access under the anti-competitive theory that the facility is not being used by the ILEC to provide a

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response to competitive pressure).

[46] California PUC comments at 44.

[47] BellSouth comments at 17-18; Verizon comments at32; SBC comments at 32.

[48] Time Warner highlights other troubling outcomes under a scenario where an ILEC provides a bundled service offering that includes both Internet access and voice transmission services, and the CLEC offers a similar product using circuits leased from the ILEC. In such a scenario and under the NPRM's proposed classification, the ILECs "will have the incentive to provide maintenance and repair service to their own customers on terms and conditions that are superior to those provided to competitors," because the ILECs will assert that they have no obligation to

"telecommunications service."[49] These outcomes would not only contravene the Commission's past findings that loops for broadband services are unbundled network elements,[50] but also would gravely harm competition and be contrary to the public interest. Ultimately, if ILECs are able to dominate the market for these services, they will also inevitably abuse their monopoly position to the detriment of competing ISPs.[51]

Moreover, assertions that the ILECs can negotiate commercial contracts with ISPs or CLECs on a private basis without Title II regulation because the market is competitive are highly questionable. The ILECs, as discussed above, continue to retain enormous market power and thus any contracts that ISPs or CLECs attempt to negotiate with the ILECs would not be negotiated under equal bargaining power, and would particularly be disadvantageous to CLECs without the full protections of the 1996 Act. Time Warner notes that ILECs would likely engage in price squeezes if Title II regulation were eliminated for the underlying transmission services, which would further drive CLECs out of the market.[52]

Finally, as TDS Telecommunications noted, the Commission should not engage in regulatory classifications that could require carriers to monitor or audit the service provided over a facility, which as discussed below, is not only impractical and administratively difficult, but also leads to anti-competitive abuses.[53] The ILECs have a long history of anti-competitive

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provide non-discriminatory repair and maintenance for non-Title II services. *See* Time Warner comments at 21.

[49] Time Warner comments at 20.

[50] *Local Competition First Report and Order* at para. 380, *UNE Remand Order* at para. 166. Another effect of classifying broadband transmission services as an "information service" is that the ILEC may assert that it is not required to provide these transmission services to CLECs for resale at wholesale rates, since these services are not "telecommunications services." *See* CISPA comments at 4, Ohio PUC comments at 35.

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[52] Time Warner comments at 22.

[53] TDS Telecommunications comments at 2.

behavior when Section 251(c) obligations clearly do apply. It is therefore a certainty that under a framework in which Title II obligations may or may not apply depending upon the use of the underlying facility, the ILECs will refuse to provide basic UNEs until forced to do so through complaints or litigation.

XO's own experience with the ILECs' misuse of the FCC's local use restrictions for enhanced extended links ("EELs") is a telling example of what the future might hold under a framework where the jurisdictional treatment of a UNE involves a content-based analysis of the nature of the transmissions riding the facility. Under the EEL rules, an ILEC can have a third party auditor verify compliance with the local usage restrictions.[54] The audit rules are a "check and balance" that allow the ILECs to check on suspected misfilings regarding local usage. However, the audit process itself is incredibly time consuming and expensive in terms of personnel hours for all parties. In a recent ex parte filing, BellSouth provided the FCC with an example of the way the ILECs will exploit FCC rules regarding the monitoring and auditing of restrictions on traffic,[55] and admitted that it had initiated formal audits on virtually every carrier its in region - thirteen different CLECs that had converted circuits to EEL. BellSouth has clearly chosen to take an opportunity that the EEL rules present regarding the monitoring and auditing of traffic and turn it into an anti-competitive tool to burden each of its competitors with lengthy and expensive audit procedures for every order. In short, any rules that allow the ILECs to game the system through regulatory foot-dragging, will allow the ILECs to thwart competition in any way that they can until forced to provide services through complaints or litigation. Indeed, the ILECs admit just as much with regard to the NPRM's proposal to deregulate the transmission

[54] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC 00-183, CC Docket No. 96-98, Supplemental Order Clarification (2000) at para. 9.

component of wireline Internet access services, noting that they would not need to unbundle their networks to CLECs who seek to use loops or facilities for broadband Internet access services.[56]

C. Less Competition Means Higher Prices and Less Broadband Deployment

As discussed, the NPRM would be counter-productive to the goals of ubiquitous broadband availability. A number of commenters explain that ILEC deployment of broadband facilities only has been stimulated with the presence of competitors in the market.[57] Moreover, the Ohio PUC notes that "there is nothing in the record indicating that these [advanced] services are not currently being offered," and "the more likely outcome of this proposal will be fewer providers and higher prices to end users."[58] XO agrees with commenters who note that higher DSL prices will mean that fewer customers seek or demand the service, resulting in even less deployment of broadband services.[59]

A number of commenters cite industry articles and analyses showing that there is no current shortage of broadband availability to households. XO agrees with Time Warner for example that the Commission should reconsider its assumption that ILEC broadband deployment needs to be stimulated; in fact, DSL deployment is substantial and has only slowed in response to factors other than current regulatory policy, such as technical limitations among other things.[60] Approximately 75-80% of all homes have access to broadband Internet access services – yet only

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[55] *See* Ex parte Letter from W.W. Jordan, BellSouth to Marlene Dortch, FCC (June 20, 2002).

[56] *See, e.g.*, BellSouth comments at 17-18; SBC comments at 32.

[57] Ohio PUC comments at 28-32; Covad comments at 12; CISPA comments at 13(noting that removal of safeguards against discrimination would permit ILECs to further extend their monopoly); WorldCom comments at 27-29 (noting that ILECs have long had available DSL service, but only deployed it once CLECs and cable modem providers forced the ILECs to deploy in order to compete).

[58] Ohio PUC comments at 28.

[59] Ohio PUC comments at 28; California PUC comments at 37, Alaska Comm'n reply comments at 6-8.

[60] Time Warner comments at 6

11% subscribe. The predominant reason for the low subscribership rate appears to be "the high price of DSL."[61] Accordingly, the Commission's goal of increasing broadband availability to all Americans should perhaps be reframed to increasing broadband *affordability* for all consumers. Only when prices fall will such demand rise, and further broadband network investments be made.

Moreover, as a majority of parties indicate, radical departure from the existing regulatory framework would further decrease competition and lead to rising DSL and cable-modem service prices, which in turn would dampen consumer demand and ultimately, broadband deployment.[62] Time Warner and WorldCom both note that the effect of the regulatory uncertainty created by this NPRM and pending legislation is further "drying up … the capital markets for competitive providers,"[63] discouraging capital investment, and ultimately "undermin[ing] the long-term strength of the economy."[64] As TDS Telecom also notes, the NPRM's proposals would also impede the rollout of rural broadband deployment, especially given that networks of rural carriers are extremely costly to upgrade.[65] TDS Telecom further points out that customer demand for new products and services such as DSL is behind broadband deployment more than any other factor, and given the high cost of deployment in rural areas, the anti-competitive

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[61] Ohio PUC comments at 29.

[62] *See e.g.*, Ohio PUC comments at 29; WorldCom comments at 38 (noting that retail prices for DSL have already risen markedly over the past year with falling competition); Covad comments at 25-26 (noting the harmful effects that the NPRM's proposed conclusions would have on its business); TDS Telecommunications comments at 14; Time Warner comments at 8.

[63] Time Warner comments at 8.

[64] WorldCom comments at 3.

[65] TDS Telecommunications et al. comments at 14.

effects of the NPRM's proposals will only further delay rural broadband deployment.[66] Accordingly, the ultimate result of less competitive choice is that consumers are harmed and the deployment of broadband choices is delayed.

IV. THIS NPRM WOULD HAVE A POTENTIALLY DETRIMENTAL IMPACT ON UNIVERSAL SERVICE

Finally, nearly all commenters note that the NPRM would have significant impact on the current universal service regulatory framework.[67] The Commission should consider carefully these impacts before it proceeds to deregulate wireline broadband Internet transmission services. Given that the current regulatory regime assesses carriers universal service contributions based on the tariffed rates for telecommunications services, if the Commission classifies wireline broadband Internet services as "information services," carriers could potentially move a significant portion of their services into the "information services" category and avoid universal service contribution assessments.[68] WorldCom points out that there would be "an immediate reduction in the contribution base," and the impact would only grow as ILECs continue to expand the scope of services it offers through an Internet platform.[69]

XO further agrees with Time Warner and various other commenters that a connection-based approach to universal service would not solve these problems. The California PUC notes that a connections-based approach would have proportionally disparate impacts on low-income consumers; Time Warner also explains that such an approach would further create problems of

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[66] *Id.* at 7-8, 15.

[67] *See generally* California PUC comments; WorldCom comments; Socket Holdings Corporation comments; CISPA comments.

[68] As the California PUC notes, deregulation of self-provisioned broadband internet services will encourage migration of voice traffic to wireline broadband Internet platforms, and thus ILECs would likely favor using the Internet for voice traffic. California PUC comments at 47.

[69] WorldCom comments at 84.

assessing the total interstate telecommunications service revenues and allocating obligations fairly and equitably.[70] As XO and other parties have commented recently in the Commission's universal service proceeding, a connections-based approach for funding universal service is inappropriate and inconsistent with the requirements of the 1996 Act.[71]

Finally, many commenters indicate that the classification of wireline broadband Internet services as "information services" would require a recategorization of the joint and common costs of the network between regulated Title II services and Title I information services.[72] As Time Warner notes, such a classification would require the Commission to engage in "difficult and ultimately arbitrary cost allocation proceedings."[73] ILECs would need to reallocate their plant and central office equipment based on the "relative use" of the facilities for regulated and unregulated services, based on per minute usage, but, broadband usage cannot exactly be quantified on such a basis.[74] XO agrees with Time Warner that engaging in such cost allocation proceedings would be time consuming and result in arbitrary allocations, and further would only provide the ILECs the incentive to cross-subsidize unregulated services offered on facilities that are used for regulated services.[75] Although the ILECs claim that price-cap regulation has eliminated the incentive to cross-subsidize, Time Warner correctly points out that a regulated

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[70] California PUC comments at 46; Time Warner comments at 27. In addition, as Time Warner notes, the Commission should not expressly exclude wireline broadband Internet access services from potentially being included as a universal service offering.

[71] *See Federal-State Joint Board on Universal Service*, CC Docket No.96-45, Time Warner Telecom, XO Communications and Allegiance Telecom comments (filed April 22, 2002) at 5.

[72] Time Warner comments at 23; State Members of the Federal-State Joint Board on Separations comments at 3-4.

[73] Time Warner comments at 22.

[74] Time Warner comments at 23.

[75] Time Warner comments at 24.

price-cap company still has some incentive to cross-subsidize unregulated services by misallocating costs to the regulated side, resulting in artificially high rates.[76]

V. THE NPRM WOULD UNDERMINE OTHER COMMISSION REGULATORY IMPERATIVES

Commenters also highlight other potential negative effects resulting from this NPRM, which range from endangering national security and network reliability, to consumer protection concerns.

A. National Protection and Network Reliability Issues

The Secretary of Defense, the Department of Justice and the Federal Bureau of Investigation ("FBI") caution that CALEA obligations may be evaded under the removal of Title II regulations over the ILEC facilities.[77] CALEA applies to "telecommunications carriers" and not to persons or entities "insofar as they are engaged in providing information services." See 47 U.S.C. 1002(a), 1001(8). The Secretary of Defense notes that classification of wireline broadband internet access services as an "information service" would require the Commission to enact new rules and regulations governing national security and emergency preparedness under Title I, because current rules do not apply to "information services."[78]

XO agrees with these comments that it is essential that the Commission must retain the current classification of wireline broadband Internet transmission services as "telecommunications service" for purposes of national security and network reliability. The Department of Justice/FBI note that the definition of a "telecommunications carrier" under

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[76] *Id.*

[77] *See generally* Secretary of Defense comments; Department of Justice/FBI reply comments.

[78] Secretary of Defense comments at 3-5.

CALEA is an entity engaged "in the transmission or switching of wire or electronic communications as a common carrier for hire"[79] and the carrier's decision to "sell its broadband service directly to the public, or indirectly through an intermediary, should not change its status and obligations under CALEA."[80] The Department of Justice/FBI expressly caution the Commission from classifying the transmission component as merely "telecommunications" and not as a "telecommunications service," because, contrary to SBC's and Verizon's comments, they note that the Commission's proposed rules may affect CALEA's mandate to carriers to preserve the government's technical ability to regulate and monitor communications carried over wireline broadband facilities.[81] Moreover, as Time Warner states, CALEA expressly excludes "information services" and the provision of transmission on a private carriage basis from its scope; accordingly the NPRM's proposed classification of transmission services is problematic.[82]

In addition, Time Warner highlights the fact that the classification of these services as "information services" would impede the Commission's jurisdiction to enforce network reliability provisions contained in 47 U.S.C. Section 256.[83] The scope of Section 256 is limited to "telecommunications service," and thus, could be evaded by carriers if they offer broadband Internet access services, and could have harmful effects for network reliability.

B. Consumer Protection/Privacy/Disabilities Issues

The NPRM may result in a number of other effects on consumers, including the erosion of consumer privacy protections; and limitation of Internet access for persons with disabilities.

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[79] DOJ/FBI reply comments at 2, citing 47 U.S.C. 1001(8)(A).

[80] *Id*. at 6.

[81] *Id*. at 4.

[82] Time Warner comments at 28.

[83] *Id*. at 28-29.

XO agrees with numerous commenters who further express concern that consumer protections, such as privacy among other things, would be eroded under the classification of wireline broadband internet access services as "information services."[84] The Commission's ability to enforce these critical provisions of the Act and its rules would be undermined under the NPRM's proposal.

Specifically, the Commission's rules on customer proprietary network information ("CPNI") provide that every telecommunications carrier has a duty to protect the confidentiality of a customer's proprietary information that has been obtained for purposes of providing "any telecommunications service."[85] To the extent, therefore, that the Commission classifies the bundled offering of a wireline Internet access service as an "information service," the ILEC that provides such services to its customers would be able to use any CPNI it obtains without regard or compliance with privacy rules.

The Telecommunications for the Deaf also caution that the Commission's action in this NPRM must not discriminate against consumers with disabilities. For example, Section 255 of the 1996 Act requires that a "provider of *telecommunications service* shall ensure that the service is accessible and usable by individuals with disabilities."[86] As this organization points out, the statute and the Commission's regulations would not apply to providers of "information services," and thus under the NPRM's proposals the disabled community will "no longer have the legal

[84] *See, e.g.*, Time Warner comments at 29; California PUC comments at 41-43; CISPA comments at 26-27;

[85] *See* 47 C.F.R. § 222.

[86] Telecommunications for the Deaf comments at 7.

right to equal access to extremely important telecommunications services – which Commissioner Copps has called a civil right."[87]

VI. THERE ARE LESS DRASTIC AND LESS ANTI-COMPETITIVE WAYS TO ACHIEVE THE COMMISSION'S GOAL IN THIS NPRM

As mentioned, one of the Commission's primary goals in this proceeding is to promote the ubiquitous availability of broadband to all Americans. By adopting the proposals in its NPRM, however, the Commission will be achieving the exact opposite outcome: reducing competitive alternatives to the monopoly providers of broadband services and eliminating the incentives for broadband deployment. Moreover, the Commission's other goals of promoting all broadband technologies equally, minimizing regulation to promote investment and innovation, and creating a framework that treats multiple broadband platforms consistently, could be accomplished by less drastic means than those proposed in this NPRM. Under a more measured approach, the Commission should continue to treat the transmission component of wireline broadband Internet access services as a "telecommunications service" and, where the factors have been met, use its forbearance authority to circumscribe its Title II regulation of the service to the extent necessary and reasonable.

Time Warner points out that the Commission may under Section 10 of the Act[88] forbear from applying any regulation or provision of the Act to a telecommunications carrier or telecommunications service, if the Commission determines that the conditions for forbearance have been met.[89] Specifically, the Commission should forbear from enforcing provisions or regulations if: (1) enforcement is unnecessary to ensure charges and practices are just and

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[87] *Id.* at 8.

[88] 47 U.S.C. § 160.

reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is unnecessary for consumer protection; and (3) forbearance is consistent with the public interest.[90] Thus, once Sections 251(c) and 271 of the 1996 Act are fully implemented, these provisions may be subject to forbearance if these conditions have been met.

The Commission could, once forbearance conditions have been satisfied, determine to eliminate certain obligations under Section 251(c). Moreover, Time Warner also notes that the Commission already has the authority to determine which network elements may be subject to unbundling requirements under Section 251(d)(2), and further the Commission is committed to reviewing these unbundling obligations every three years. The Commission accordingly has ample authority to reduce or minimize regulatory obligations where it is appropriate and conditions have been met.

XO agrees with Time Warner, however, that the Commission cannot at this time conclude that there is any sufficient amount of competition to reduce current regulatory controls over the ILEC's bottleneck facilities.[91] No matter what the Commission determines in this proceeding, it must treat the wireline transmission that ILECs provide either to themselves or to others for broadband Internet access as "telecommunications services" subject to dominant common carrier regulation. Any other treatment would not only undermine the Commission's exact goals in this proceeding but would effectively decimate the very purpose of the 1996 Act.

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[89] Time Warner comments at 29.

[90] 47 U.S.C. § 160(a).

[91] Time Warner comments at 32.

VII. CONCLUSION

For the foregoing reasons, XO urges the Commission to retain the existing regulatory framework and classify the transmission component of wireline broadband Internet access services as "telecommunications services" subject to Title II regulation.

Respectfully submitted,

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